IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CHAPTER 11
TARACORP, INC., a/k/a EVANS METAL COMPANY, SEITZINGERS, IMACO, and TARACORP INDUSTRIES Debtor.	CASE NO. 82--04654A
TARACORP, INC. a/k/a EVANS METAL COMPANY, SEITZINGERS, IMACO and TARACORP INDUSTRIES, Plaintiffs (Movants), v. PEOPLE OF THE STATE OF ILLINOIS ex rel. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Defendant (Respondent).	ADVERSARY PROCEEDING NO. 83-2063A JUDGE ROBINSON

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

In its Application for Injunctive Relief, Taracorp asks this Court to enjoin the State of Illinois Environmental Protection Agency [hereinafter "IEPA"] from any activity which would lead ultimately to the inclusion of the Granite City facility on the National Priorities List [hereinafter "NPL"], on the sole basis that the IEPA's "certification to USEPA will

only be for the purpose of enhancing Illinois' monetary claim." For the reasons stated below, Taracorp's Application fails to state a claim upon which relief can be granted and this Court lacks jurisdiction to bear such claim and to grant such relief. The Application should therefore be denied in its entirety with prejudice.

A. DESCRIPTION OF CERCLA

Although some of the important provisions of the "Superfund" law (Title I of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 or "CERCLA", P. Law 96-510, 42 U.S.C.A. §§9601 et seq.) are discussed more fully below, a brief overview will aid in understanding the arguments below.

CERCLA is the U.S. Congress' response to growing concern over the many hazardous waste sites across America leaking or emitting dangerous materials and chemicals into the air and water. Congress recognized the costs of evaluation and remediation of the dangers in some of the cases would be well beyond the financial resources of the owners (who, in any event, would be reluctant to expend their resources). Furthermore, Congress was concerned that the invocation of the traditional legal remedies, with their inevitable delays, would lead to lengthy courtroom wrangling, while the pollution problem went on unabated or even worsened.

Congress therefore established in CERCLA a mechanism whereby USEPA could use money generated from a special

petroleum tax (under Title II of CERCLA) to evaluate and cleanup a waste site causing environmental problems and then, after the dangers posed by the site are identified and alleviated, file (if needed) a suit to recover the costs incurred. It is the first step of this mechanism that IEPA seeks to have USEPA employ in the case of Taracorp's Facility.

In order to assure that USEPA developed appropriate mechanisms for responding to hazardous waste sites, and focused its attention on the most dangerous of these sites, Congress required in Section 105 of CERCLA the development of a National Contingency Plan ("NCP"). The NCP is to include (a) procedures for evaluating the relative degree of hazard posed by any given site and (b) a listing of the 400 worst sites across the country. The former is the "Hazard Ranking System" ("HRS"), developed by USEPA and promulgated in 47 Fed. Reg. 31180 (7-16-82). The latter is known as the National Priorities List, or NPL. The NPL, under Section 105(8)(B), is to be updated "no less often than annually"; in practice, USEPA promulgates a revised NPL semi-annually. Section 105 allows states to propose sites for the NPL but, with the exception of one site per state, it is the USEPA which decides, based on the location's HRS score, whether the location appears on the NPL. Taracorp here seeks to block Illinois from requesting that USEPA list the Granite City property on the NPL.

USEPA is empowered to respond to a release or threatened release of hazardous matter into the environment in

two ways. Section 104 authorizes immediate remediation by USEPA if the owner or operator of the site will not deal with the problem. Section 106 authorizes an action in the federal district court to abate the hazard, where there is an "imminent and substantial endangerment to the public health or welfare or to the environment."

The key section, for purposes of Taracorp's claim for injunctive relief, is Section 107. USEPA is authorized, under Section 107(c)(3), to sue any person who is liable for a release or threatened release of a hazardous substance and who has failed "without sufficient cause to properly provide removal or remedial action" upon the order of USEPA under Sections 104 and 106, for punitive damages "equal to and not more than three times" the costs of cleanup incurred by USEPA. This provision, the "treble damages" clause referred to under Paragraph 25 of Taracorp's Application, does not allow a State to seek treble damages. Perhaps more importantly, a Section 107 suit is not preconditioned on the site in question being listed in the NPL; any site, the listing of which is consistent with the NCP, is subject to the order of USEPA and to the potential treble damage claim by USEPA.

II. UNDER LONG-STANDING PRINCIPLES OF EQUITY PRACTICES, TARACORP'S APPLICATION FAILS TO STATE A CLAIM UPON WHICH EQUITABLE RELIEF CAN BE GRANTED

A. TARACORP HAS NOT SHOWN IT IS ENTITLED TO INJUNCTIVE RELIEF UNDER THE TRADITIONAL FOUR-PART TEST FOR SUCH RELIEF

Equitable relief is "an extraordinary and drastic remedy", and the "granting of a preliminary injunction is the exception rather than the rule." State of Texas v. Seatrain International, S.A., 518 F.2d 175, 179 (5th Cir. 1975); Canal Authority of State of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974). Equity has established a four-part test for preliminary equitable relief,* each part of which the moving party must meet:

> "(1) a substantial likelihood that the movant will eventually prevail on the merits;
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> (2) a showing that the movant will suffer irreparable injury unless the injunction issues;
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> (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the party or parties opposed; and
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> (4) a showing that the injunction, if issued, would not be adverse to the public interest."
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> 518 F.2d, at 179.

Taracorp's Application fails to meet any of the elements of this test.

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*The Taracorp Application unfortunately fails to specify whether it is seeking preliminary or permanent injunctive relief or both; for purposes of this Memorandum, IEPA and the State of Illinois will assume Taracorp asks for preliminary relief.

1. Taracorp Cannot Show a Substantial Likelihood that It Will Prevail on the Merits.

Taracorp's Application fails to demonstrate any likelihood that it will prevail on the merits. First, as is demonstrated immediately below, Taracorp meets none of the other requirements for injunctive relief, all of which are required for both preliminary and permanent injunctions. Second, the so-called "facts" alleged by Taracorp, many of which are demonstrably false, fail to show it is entitled to the relief requested.

Simply put, Taracorp owns a three-acre, 30 foot high, 200,000 ton (at least) waste pile, admitted by Taracorp* to be hazardous, containing lead, lead oxide, lead smelting slag, battery casing material, other lead-bearing matter and unknown material. The pile also contains several hundred barrels of unknown chemicals; little if anything is definitely known about the composition of the interior of the pile. Taracorp's smelter is and has been the only lead smelter in the area; the soils on a wide area around the plant, including those in residential areas, have patterns of concentrations of lead that clearly demark Taracorp's facility as the source of the soil

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*Taracorp filed with USEPA its Part A Application, pursuant to the Resource Reservation and Recovery Act (RCRA). This document was filed on November 18, 1980, and designated the waste pile as an existing hazardous waste pile containing 147,000 cubic yards of material. See the Taracorp Part A RCRA Application, attached here as Exhibit A.

Figure VI-7, pg. 18, of
lead. See the April, 1983 Health Study, attached hereto as Exhibit B, and referred to in Taracorp's Application, Paragraph 13. Taracorp says that this study stated that testing "established that citizens of the Granite City area had not suffered any harm from the operation of the Granite City facility." Application, Paragraph 13. This assertion is patently false; the study's opening paragraph, under "Summary, Findings and Recommendations," concluded:

> "Although significant contamination of the environment exists in the vicinity of the secondary lead smelter [the Taracorp facility], the preliminary assessment of the IEPA and the IDPH [Illinois Department of Public Health] is that a major near-term risk to public health is unlikely to exist provided that ambient air quality levels do not exceed the National Ambient Air Quality Standard and that routine personal health and hygiene measures are followed. However, the high levels of lead found in the soil on and near the smelter site are cause for continued concern. Because uncertainty remains regarding the long-term health implications of these high soil-lead concentrations, prudence dictates that dust control measures be implemented immediately. Further ground water and blood testing planned for the area will indicate what additional pollution control measures are necessary to reduce health hazards."
>
> (Health Study, p. 2)

It is precisely this further "testing" that Taracorp now seeks to prevent.

In addition, airborne emissions from the smelter and from the pile have generated air lead levels in excess of the federal health levels of 1.5 micrograms per liter in 10 of the past 16 quarters since Taracorp purchased and has been operating the facility leading the USEPA to designate Granite City as a "non-attainment" area for lead air concentrations (the

only one in Illinois), thus obligating the State of Illinois to prepare the State Implementation Plan (SIP) referred to in Paragraph 20 of Taracorp's Application and attached hereto as Exhibit C. See the March 22, 1982 Federal Register.

Given this evidence, it is unlikely Taracorp will prevail on the merits in obtaining permanent relief. This Court should deny the preliminary injunction.

2. Taracorp's Application Fails to Allege Irreparable Injury.

The Application for Injunctive Relief filed by Taracorp is devoid of any allegation of irreparable injury to Taracorp that might arise should Illinois seek to have USEPA list the Granite City site on the NPL under Section 105 of CERCLA. As is more fully discussed in Part II-C of this Memorandum, IEPA's request to USEPA for such a listing would in fact cause no harm, irreparable or otherwise, to Taracorp, since several intervening decisions, not within the power of the IEPA, must be made before such listing occurs and Taracorp retains the right to comment upon and contest each and every of these decisions.

Further, as was noted in D'Imperio v. U.S., (Civ. No. 83-1369, D.N.J., Dec. 1, 1983), a listing on the NPL is for informational purposes and reflects no judgment on the liability of the owner or operator of the site in question for damages, treble or otherwise. This holding is consistent with the USEPA's declaration in its promulgation of the National Priorities List that "[i]nclusion of a site on the NPL does not establish that [USEPA] necessarily will undertake response actions. Moreover, listing does not require any action of any

private party, nor does it determine the liability of any party for the cost of cleanup at the site." 48 Fed.Reg. 40658 (9-8-83). Hence the IEPA's action in seeking such a listing, being several steps removed from the formal USEPA listing of the Granite City property on the NPL and even more removed from any USEPA treble damage claim against Taracorp, cannot cause the purported harm Taracorp claims.

3. Taracorp's Application, Being Devoid of any Substantial Allegation of Harm, Fails to Allege Harm Greater Than That Which Would be Suffered by the State of Illinois Should This Injunction be Granted.

The State of Illinois and the IEPA have straightforward and explicit responsibilities under the Illinois Constitution and Illinois law to protect the environment of Illinois citizens. Art. XI, §1 of the Illinois Constitution provides:

> "The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy."

Section 2(b) of the Illinois Environmental Protection Act [hereinafter "State Act"], Ill. Rev. Stat., ch. 111 1/2, §1002(a)(iv), states one of the purposes of the State Act: "to restore, protect and enhance the quality of the environment."

Under Section 105(8)(B) of CERCLA, Illinois has the power, indeed the duty, to submit to USEPA those sites within its boundaries which it believes meet the criteria established in Section

105(8)(A) for listing on the overall list of sites requiring remedial action or on the NPL. Illinois' actions in seeking a Superfund listing would be entirely consistent with its obligations under the Illinois Constitution and the State Act. Taracorp's Application would defeat the fulfillment of these duties.

Illinois seeks a Superfund listing for the Taracorp site principally to obtain USEPA technical expertise in treating problems of this sort and a source of funding for an evaluation and remedy for the environmental problems caused in part by Taracorp at the site, funding Illinois itself lacks. IEPA is presently negotiating with NL Industries, the previous owner of the site, for an evaluation study, but at present it is far from clear that NL will perform a study meeting the needs of the site. USEPA will pay 90% of the costs of evaluation and remediation, requiring Illinois to pay only 10%. Without sund funding, the State of Illinois, in a serious financial crisis, would have to pay for <u>all</u> the costs of a study and any subsequent cleanup. Without such an evaluation, it is impossible to determine the extent of any pollution hazard and the best method of eliminating such hazard.

Taracorp's Application, on its face, has no bearing on the independent power or the duty of USEPA to place the site on the NPL. It is clear, however, that Taracorp's real purpose in this proceeding is to impede and, if possible, block altogether such listing. The harm such a result would cause, when measured against the absence of any benefit to Taracorp as pleaded in its Application, demonstrates this injunction ought not be granted.

4. The Public Interest Favors Denial of Taracorp's Application.

Courts of equity should "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Weinberger v. Romero-Barcelo, 102 S.Ct. 1798 (1982). This principle is especially applicable in cases where a private party seeks to bar administrative action pursuant to a statute. West Virginia Highland Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971); Lewis v. Richardson, 428 F.Supp. 1164 (D.Mass. 1977). See also Yakus v. U.S., 321 U.S. 414 (1944).

The public interest as reflected in CERCLA favors not restricting the power and duty of the State of Illinois and IEPA to seek a Superfund listing for Taracorp's facility. The purpose of CERCLA, as discussed above (Part I), is to allow for identification, evaluation and remediation of environmental hazards. An injunction will defeat this fundamental goal and leave Taracorp's site, already demonstrated to be at least an air hazard, without an effective remedy. Such a result, especially in light of the lack of immediate or irreparable harm to Taracorp from a request for a Superfund listing, would be against the public interest.

B. TARACORP'S APPLICATION FOR INJUNCTIVE RELIEF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE AN INJUNCTION IMPOSED UPON THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY WILL NOT NECESSARILY PREVENT THE TARACORP FACILITY FROM LISTING ON THE NATIONAL PRIORITIES LIST.

As noted earlier, Section 105 of the CERCLA required the development of a National Contingency Plan ("NCP"), the

purpose of which is to establish procedures and standards for responding to releases of hazardous substances. The NCP was promulgated by the USEPA on July 16, 1982 (47 Fed. Reg. 31180) and contains, inter alia, criteria for determining appropriate removal and remedial actions. Under Section 105(8)(B) of CERCLA, the criteria contained in the NCP are to be used to prepare a list of national priorities among the known or threatened releases of hazardous substances throughout the United States. This list is known as the "NPL". The first NPL was promulgated as an amendment to the NCP on September 8, 1983 (48 Fed. Reg. 40658). Under Section 105(8)(B) of CERCLA, the NPL is to be revised annually. Each year "each State shall establish and submit for consideration by the President priorities for remedial action among known releases and potential releases in that State based upon the criteria set forth in [the NCP]." (42 U.S.C. §9605(8)(B)).

In its application for injunctive relief, Taracorp is seeking to enjoin the State of Illinois and the Illinois Environmental Protection Agency from designating the Taracorp facility as a candidate for inclusion on the NPL. However, an injunction imposed against Illinois or the IEPA will not by itself prevent the Taracorp facility from becoming a candidate for inclusion on the NPL. The federal government, as well as the state, may propose sites for the NPL. "Section 105(8) of CERCLA contemplates that the bulk of the initial identification of sites for the NPL will be done by the States according to

EPA criteria, although EPA also has independent authority to consider sites for listing." (48 Fed. Reg. 40659 (9-8-83)) (emphasis added). Indeed, a number of the sites listed in the September 8, 1983 NPL were independently evaluated and "scored" by the USEPA pursuant to the Hazard Ranking System ("HRS") in the absence of any separate state evaluations based upon NCP criteria.*

In short, the imposition of an injunction against the State of Illinois or IEPA prohibiting the nomination of the Taracorp facility as a candidate for inclusion on the NPL gains Taracorp nothing, simply because the federal government may consider the site for listing regardless of the existence of any legal constraints upon the State of Illinois or IEPA. Because Taracorp's application for injunctive relief, if granted, will not, by itself, prevent the Taracorp facility from being nominated as a candidate for NPL inclusion, Taracorp will not gain the relief it seeks solely through an injunction against the State of Illinois and the IEPA. "[A] court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff." Virginia Ry. v. Federation, 300 U.S. 515, 550; see also Dale System v. Time, Inc., 116 F.Supp. 527 (D.Conn. 1953); Karls v. Alexandra Realty Corp., 179 Conn. 390, 426 A.2d 784 (1980). Accordingly, because no complete relief can be granted on the basis of Taracorp's application, it should be dismissed with prejudice.

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*One of the sites which the USEPA has itself proposed to include was Times Beach, Missouri (48 Fed. Reg. 40659 (9-8-83)).

C. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE NO CASE OR CONTROVERSY EXISTS AND THE CASE IS, THEREFORE NOT RIPE FOR DECISION. IN ADDITION, PLAINTIFF HAS A FULL OPPORTUNITY FOR NOTICE AND COMMENT UPON A PROPOSED NPL LISTING BY USEPA AND FURTHER HAS THE RIGHT TO APPEAL ANY FINAL LISTING BY USEPA, AND HAS NOT, THEREFORE, EXHAUSTED ITS ADMINISTRATIVE REMEDIES.

The action asked to be enjoined -- IEPA's request to USEPA for a Superfund listing -- is not of itself a listing of any kind, but merely the initiation of consideration of the merits of such a listing by USEPA, pursuant to the National Contingency Plan. USEPA must then review the request and decide itself whether to make a formal proposal in the Federal Register to add a site to the NPL before it can promulgate a final listing of the site in the Federal Register. The proposal is afforded a public comment period; federal law requires consideration of all such comments by USEPA prior to final promulgation. 5 U.S.C. 553. These rights are of both legal and practical significance, as evidenced in the fact that public comment on USEPA-proposed inclusions in the first NPL in September, 1983 has caused a change in the Hazard Ranking System ["HRS"] scores, which determine the eligibility of a site for listing, for a substantial number of sites and, more importantly, outright deletion of sites originally proposed for listing. See 48 CFR at 40664. Once USEPA makes a final listing of a site, any affected party has the additional legal right to appeal such a listing, pursuant to Section 113(a) of CERCLA, 42 U.S.C. 9613. See also 5 U.S.C. 704.

The principles of ripeness and exhaustion are not abstract ones in the context of this case. Movant seeks to abort statutory procedures for assessing and remediating what Congress has determined to be a major public health and environmental problem -- the presence of hazardous waste in the midst of residential, commercial and industrial areas where many people live and work. In this case, the Taracorp site includes, according to Movant's own declaration to USEPA, a minimum of 200,000 tons of lead-bearing hazardous waste, and may include substantially more. Photographs show this hazardous waste has spilled over onto adjoining properties and is located adjacent to high population residential areas in a major metropolitan area. The waste pile is a cause, in part, of demonstrated and long-standing violations of the federal lead air concentration standard in Granite City. Lead at this concentration in the air is a known hazard to health, especially for children.

Movant, however, asks that the Court order a halt to IEPA efforts to have USEPA assess the extent of the problem. Taracorp's Application is not clear on the question of why it believes IEPA ought not be permitted to seek USEPA help in dealing with this problem. If Taracorp is arguing that IEPA is not entitled under CERCLA to approach USEPA for its assistance, the discussion above demonstrates this claim has no merit. If, on the other hand, Taracorp believes its site does not warrant USEPA attention through Superfund, then its Application here is premature and would improperly prevent the development of a

complete administrative record on that precise question. Federal Trade Comm'n v. Standard Oil Co. of California, 449 U.S. 232, 101 S.Ct. 488 (1980). To repeat, IEPA's effort to have this site listed is based on the need for considerable further information on the site. Although preliminary indications are to the contrary,* it may well be that USEPA evaluations will prove the site not worthy of listing on the NPL, which will afford Taracorp the relief it seeks here. But without USEPA having that opportunity, it is impossible to determine whether a listing of the site would be arbitrary and capricious. Hence Taracorp's Application should be denied.

D. TARACORP LACKS THE CLEAN HANDS REQUIRED FOR GRANT OF AN INJUNCTION

Taracorp purchased the Granite City site pursuant to a contract with NL Industries, Inc. on August 22, 1979. One of the express terms of that contract (Section 13(f)), provided:

> "(f) Granite City "Slag Pile": Purchaser shall commence removal of the slag pile at the Granite City Plant within six months from Closing, and Seller shall pay to Purchaser $500,000 at Closing towards the cost of removal. Seller and Purchaser shall retain their respective liabilities for any claims of water pollution due to the slag pile for a period of five years from Closing.

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*IEPA is informed that the USEPA contractor responsible for conducting preliminary HRS scoring of the Taracorp site has assigned a score of 34.4, almost six points above the minimum required for NPL listing.

> Purchaser hereby indemnifies and holds Seller harmless from any and all claims, loss, expense, cost or obligation, including reasonable attorneys' fees, arising from claims made for water pollution due to the slag pile brought more than five years after the Closing even if such claim relates to a period prior to the Closing."

Taracorp entered into a contract with St. Louis Lead Recyclers to dispose of the pile, a contract since repudiated. Furthermore, Taracorp provided to IEPA in January, 1983, a closure and post-closure plan for the hazardous waste pile, in which it agreed to have the pile removed by 1989 through recycling. Copies of the contract and plan are attached as Exhibits D and E, respectively.

Taracorp seeks an injunction against any Illinois effort to have the Granite City site listed under CERCLA. In order to have this Court grant equitable Relief, Taracorp must have, as the maxim puts it, "clean hands." But, as the facts set forth above demonstrate, Taracorp's conduct has led directly to the harm for which IEPA seeks a CERCLA listing.

Had Taracorp used the $500,000 expressly provided for remedial action under the sales contract for remediation of the waste pile (or, for that matter, had Taracorp not declared a $5,000,000.00 dividend for its sole stockholder), the need for a CERCLA listing to identify and solve the environmental hazards posed by the site could well have been eliminated. Taracorp failed to perform the obligations it agreed to undertake under the sales contract and told IEPA it would perform in the closure plan and thereby failed to remedy the environmental problems

IEPA now seeks to remedy under CERCLA. Yet it asks this court of equity to block what may be the only viable way of dealing with these environmental problems. These facts justify this Court dismissing with prejudice Taracorp's injunction action.

III. THIS COURT LACKS JURISDICTION TO ENTER AN ORDER BARRING IEPA'S SUBMITTAL OF A REQUEST TO LIST TARACORP'S PROPERTY ON THE SUPERFUND LIST.

Section 362(a) of the Bankrupcy Act, 11 U.S.C. §362(a), spells out the various kinds of proceedings stayed by the filing of bankruptcy. Section 362(b) sets forth the proceedings which are not stayed by a bankruptcy filing; included are:

> "commencement of or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." (Section 362(b)(4).)

IEPA seeks a Superfund listing because the facts relating to the Taracorp site, with the huge volume of lead-bearing waste, demonstrated lead-air violations and the close proximity of residential areas, justify a close and thorough investigation. Illinois seeks to have USEPA do such investigation because the federal agency has the resources (provided by CERCLA) and the technical expertise to do the work and Illinois will benefit from this expertise and be required to bear only 10%, rather than 100%, of the costs, as spelled out in USEPA policy. This effort falls squarely within the §362(b)(4) exception from the automatic stay provision. IEPA respectfully suggests, therefore, that the automatic stay provision does not authorize this Court preventing IEPA from seeking the listing of the site on the NPL. Rather, this court should give effort to the

Congressional declaration found in Section 113(b) of CERCLA that matters arising under that statute be heard by the federal district court and in Section 113(a) that appeals from regulatory action such as the listing of a site on the NPL be heard by the District of Columbia Circuit Court of Appeals, and allow any litigation involving CERCLA matters be heard by those courts.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
and ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Defendants-Respondents,

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